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No. 92-1458

In the Supreme Court of the United States

OCTOBER TERM, 1992

ALBERTO A. ROSALES, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner, who became a fugitive during trial and was recaptured before sentencing and filing a notice of appeal, forfeited his right to appeal alleged trial errors.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is unpublished, but the decision is noted at 978 F.2d 719 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1992. The petition for a writ of certiorari was filed on January 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of engaging in a continuing criminal

enterprise (CCE), in violation of 21 U.S.C. 848 (Count 1); two counts of conspiracy to import marijuana, in violation of 21 U.S.C. 963 (Counts 2, 4); one count of conspiracy to possess various controlled substances with intent to distribute them, in violation of 21 U.S.C. 846 (Count 6); two counts of importation and attempted importation of marijuana, in violation of 21 U.S.C. 952(a) (Counts 3, 5); and three counts of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 7, 9, and 11). Petitioner was sentenced to 45 years' imprisonment on the CCE count and to consecutive terms of five years' imprisonment on each of the eight remaining counts, for a total of 85 years' imprisonment. The court of appeals vacated petitioner's convictions and sentences on Counts 2, 4, and 6, and affirmed in all other respects. Pet. App. A1-A2.

1. The evidence at trial is recounted in the government's brief in the court of appeals. Gov't C.A. Br. 4-25. Petitioner was the head of a drug ring that trafficked in heroin, cocaine, and marijuana from January 1982 to May 1985. In 1982, federal agents seized in transit several shipments of marijuana that members of petitioner's ring had attempted to smuggle into the country from Jamaica and Colombia. In 1984, one of petitioner's partners, David Quiles, quit the ring and began cooperating with the DEA. In March 1985, at the direction of DEA agents, Quiles arranged to purchase from petitioner and others one kilogram of heroin for $280,000. The negotiations culminated in the delivery of the heroin on May 13, 1985, at which time petitioner and his cohorts were arrested.

2. The trial of petitioner and his co-defendants commenced on March 23, 1987. Thereafter, on April 16, 1987—the 14th day of trial and one day after the prosecution ended its case-in-chief—petitioner absconded, and a bench warrant was issued for his arrest. Gov't C.A. Br. 3. The district court proceeded with the trial in petitioner's absence. On April 17, 1987, the jury returned its verdict convicting petitioner on all counts. Petitioner remained a fugitive until November 26, 1988, when a federal arrest warrant was served upon him in Kansas, where he was incarcerated following his arrest on state charges. Petitioner was subsequently returned to the Southern District of Florida, where he was sentenced on the instant convictions on March 29, 1989. *Id.* at 3-4.

3. The court of appeals vacated petitioner's convictions and sentences on Counts 2, 4, and 6, and in all other respects confirmed the convictions and sentences. Pet. App. A1-A2. The court of appeals vacated petitioner's convictions and sentences on the conspiracy counts based on its holding that petitioner's convictions on the various conspiracy counts had merged with his conviction on the CCE count.

Although the court reached the merits of the claim of "merger" because it concerned a "sentencing problem" that arose after petitioner's recapture, it refused to consider any of petitioner's allegations concerning errors that occurred during the course of trial. In declining to pass on the merits of the trial claims, the court relied on its prior decision in *United States* v. *London*, 723 F.2d 1538, 1539 (11th Cir.), cert. denied, 467 U.S. 1228 (1984), in which it had

held that "[o]ne who becomes a fugitive during trial waives the right to contest such [issues] on appeal." Pet. App. A2.

DISCUSSION

Petitioner contends that the court of appeals erred in holding that, by fleeing during trial and before sentencing, he waived his right to appeal his convictions based on alleged errors committed at trial.

After the court of appeals decided this case, this Court decided *Ortega-Rodriguez* v. *United States*, 113 S. Ct. 1199 (1993), in which it held that appellate courts may not automatically dismiss appeals filed by ex-fugitives who have been returned to custody before invoking their appellate rights.[1] Although the Court stated that courts of appeals are not "entirely without authority to dismiss an appeal because of fugitive status predating the appeal," *id.* at 1208, it held that that authority may be exercised only if a defendant's fugitivity effected a "significant interference with the operation of [the] appellate process." *Id.* at 1209.

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[1] Unlike petitioner, who fled during trial, the defendant in *Ortega-Rodriguez* became a fugitive after being convicted on drug trafficking charges. Like petitioner, however, Ortega-Rodriguez was recaptured prior to sentencing and filing a notice of appeal. The court of appeals in that case dismissed the appeal, relying on its earlier decision in *United States* v. *Holmes*, 680 F.2d 1372, 1373 (11th Cir. 1982), cert. denied, 460 U.S. 1015 (1983), in which it held that a defendant who flees after conviction, but before sentencing, waives his right to appeal from his conviction. This Court vacated the court of appeals' order dismissing the appeal and remanded the case for further proceedings.

Because the court of appeals' refusal in this case to consider petitioner's allegations of trial error was based on an automatic rule of dismissal that this Court repudiated in *Ortega-Rodriguez*, the court's judgment should be vacated and the case remanded for further consideration. On remand, the court of appeals may once again refuse to consider the merits of petitioner's claims only if it determines that "th[e] consequence of petitioner's flight" caused "a significant interference with the operation of its appellate process." *Ortega-Rodriguez*, 113 S. Ct. at 1209.

CONCLUSION

The petition for a writ of certiorari should be granted and the case remanded to the court of appeals for further proceedings consistent with this Court's decision in *Ortega-Rodriguez* v. *United States*, 113 S. Ct. 1199 (1993).

Respectfully submitted.

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